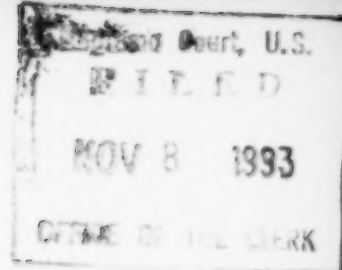


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NO. 93-144
IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1993



DEPARTMENT OF REVENUE OF THE
STATE OF MONTANA,
Petitioner

V.

KURTH RANCH;
KURTH HALLEY CATTLE COMPANY;
RICHARD M. and JUDITH KURTH,
husband and wife;
CLAYTON H. and CINDY K. HALLEY,
husband and wife;
ROBERT G. DRUMMOND,
Trustee,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF BY THE STATES OF ARIZONA,
CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA,
GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA,
IOWA, KANSAS, LOUISIANA, MAINE, MINNESOTA,
NEBRASKA, NEW JERSEY, NEW MEXICO, NORTH
CAROLINA, RHODE ISLAND, SOUTH CAROLINA, SOUTH
DAKOTA, TEXAS, UTAH AND WISCONSIN IN SUPPORT
OF PETITIONER

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The States of Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, Utah and Wisconsin, through their respective Attorneys General, respectfully submit this brief *amicus curiae* pursuant to S.Ct. R. 37 in support of the petitioner.

INTEREST OF THE *AMICI* STATES

Each state appearing as an *amicus curiae* in this case has enacted taxing statutes for the purpose of generating revenue to support the cost of government. Many of the *amici* states levy an excise tax like Montana's on dangerous drugs to apportion the cost of government and, incidentally, to require that those who contribute to the government's costs also contribute to its revenues.¹

¹At least 27 states have similar excise taxes. See Appendix to *Amicus Curiae* Brief in Support of the Petition by the states of Kansas, et al.

Extending the double jeopardy concepts of *United States v. Halper* to taxes, as the Court of Appeals has done in this case, will impede the states' abilities to impose and administer taxes which are fairly and rationally related to obtaining revenue from genuine economic value. *United States v. Halper*, 490 U.S. 435 (1989). Assuming, arguendo, that the tax is a sanction, any initial requirement that the states prove that a sanction is non-punitive will make all civil sanctions more difficult and costly to enforce.

SUMMARY OF THE ARGUMENT

The Court of Appeals was wrong to apply *Halper* in this case because Montana's tax on dangerous drugs is a true excise tax and not a penalty. A tax does not cease to be a tax merely because it has a regulatory effect, even if it is directed at illegal activities and produces only a small amount of revenue.

Legislative bodies have broad authority to define and classify subjects of taxation. The Montana statute rationally classifies items of

genuine economic value and imposes a tax on a unit of weight basis. Taxes and tax rates may be set independently of any benefit to the taxpayer and independently of any harm done by the taxpayer. Taxes are not designed to be compensatory or remedial.

Even if Montana's tax were analyzed as a penalty under *Halper*, it would not violate double jeopardy because it is not disproportionate. *Halper* holds that double jeopardy is violated where a fixed penalty appears to be overwhelmingly disproportionate or not rationally related to the damages caused by a wrongdoer. The Montana statute imposes tax in a direct ratio to the nature and volume of taxable items possessed by the taxpayer. Because the tax is always proportionate, it is permissible under *Halper* and enforceable in this case.

ARGUMENT

- I. Montana's excise tax is a legitimate exercise of its taxing power and is not subject to the *Halper* test.

A. Montana's statute is a true tax in form and function.

The Court of Appeals in this case held that Montana's tax on dangerous drugs, as applied to the Kurths, violated the double jeopardy clause because Montana offered no evidence of its costs and expenses related to the Kurths' activities. *In re Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993). "By refusing to offer any evidence justifying its imposition of the tax, the State has failed to meet the threshold requirements under *Halper*." *Id.* at 1312. "The tax assessment ... [therefore] constitutes an impermissible second punishment in violation of the federal Constitution's Double Jeopardy Clause." *Id.*

The Court of Appeals is doubly wrong because *Halper* does not apply to taxes at all and because the Court misapplied the double jeopardy principles of *Halper* to the law and facts of the case. *Halper* applies where a statute provides for: (1) a penalty (2) which is overwhelmingly disproportionate to the

government's damages and costs. Neither of these elements is present in this case.

The Court of Appeals incorrectly assumes, without discussion or analysis, that the excise tax in this case is a civil sanction or penalty subject to *Halper* rather than a tax. Presumably, the Court of Appeals viewed the tax as a penalty simply because possession of the taxable substance is illegal. If so, the Court of Appeals would be wrong.

1. The language and structure of the Montana statute show that it is a tax.

Whether a statute is truly a tax is a question of statutory construction. "We must construe the law and interpret the intent and meaning ... from the language of the tax." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36 (1922) (Child Labor Tax Case).

The Montana statute shows on its face that it operates as a tax. *Sorensen v. Montana*, 836 P.2d 29 (Mont. 1992). Montana taxes the possession and storage of dangerous drugs.

MONT.CODE ANN. §15-25-111 (1992). Montana classifies the various substances into six categories and taxes each proportionally by weight or at 10% of the assessed market value, whichever is greater. *Id.* This is an ordinary excise tax.

2. The fact that a tax is imposed on an illegal activity, and may deter that activity, does not deprive it of its status as a tax.

Taxes are designed to produce revenue for the operations of government. They are predicated on economic value, not on wrongful conduct. It so happens that the economic value in this tax case was produced illegally, but that does not alter the character of Montana's statute as a true tax. *Minor v. United States*, 396 U.S. 87 (1969). A tax is not a penalty. *United States v. Darusmont*, 449 U.S. 292, 298 (1981).

Illegal activities can be taxed. *Marchetti v. United States*, 390 U.S. 39 (1968). "The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and

nothing that follows is intended to limit or diminish the vitality of those cases." *Id.* at 44. "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible." *Id.* at 61. Similarly, the Court has never suggested that states are prohibited from taxing transactions or activities merely because they are illegal.

Regulatory effect does not turn a tax into a penalty. "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible ... or the revenue purpose of the tax may be secondary." *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (citations omitted). Accord, *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 375 (1974).

Previous decisions of this Court considering whether federal statutes exercised the taxing

power or the police power show that Montana's statute is a tax.

"If it was laid to raise revenue its validity is beyond question notwithstanding the fact that the conduct of the business taxed was in violation of law." *United States v. Constantine*, 296 U.S. 287, 293 (1935). *Constantine* held that a flat "special excise tax," which was forty times greater than the basic excise tax and which was conditioned only on the criminality of the business, was an improper penalty because it was an exercise of a police power not given to Congress rather than a tax.

Justices Cardozo, Brandeis and Stone dissented in *Constantine* on the grounds that Congress could reasonably consider the greater profits and the difficulty of tax enforcement arising from the criminal nature of a business in its classification of taxes. *Id.* at 297-298. (Cardozo, J., dissenting). *Constantine's* holding that the tax in question was a penalty has been undercut by *Sanchez*, but Montana's tax is a valid

tax under either the majority or the minority view.

In the Child Labor Tax Case, the Court concluded that a flat unapportioned "tax" of 10%, which applied only where an employer knowingly departed from a detailed course of conduct and which gave broad enforcement authority to the Secretary of Labor, was really a regulatory measure. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20. "If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this Court to infer solely from its heavy burden that the Act intends a prohibition instead of a tax." *Id.* at 36. Under this test, also, Montana's statute is a tax: it is an excise on a thing of value, devoid of detailed regulatory provisions.

B. States are given great latitude to tax economic value without restrictions as to the rate of the tax or the use of the revenue.

1. A high rate does not convert a tax into a penalty or civil sanction.

The Court of Appeals possibly assumed that the rate of the tax converted it into a penalty. This Court has never restricted state taxation based on the rate of tax.

In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 628 (1981).

In *Commonwealth Edison*, the Court approved a tax of 30% on coal, rejecting a challenge to the tax under the commerce and due process clauses. "The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." *Id.* at 627. The Court of Appeals, by requiring evidence to justify Montana's tax, would throw the courts into the midst of

political questions with which they are ill-equipped to deal.

Taxes are not meant to provide a *quid pro quo*. "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." *Id.* at 622 (quoting *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. at 521-522).

2. Montana's choice to apply these tax revenues specifically to drug-related expenses does not make its tax a penalty or sanction.

Taxes are neither remedial nor punitive. Thus, the basic concept of applying *Halper* to taxes is flawed. *Barnette v. Commissioner*, 95 T.C. 341 (1990). Although Montana has dedicated revenue from its excise tax to problems associated with drug usage, there is no requirement that any tax or its revenues serve any particular purpose.

A legislative body may, of course, consider the sources of its problems in order to fashion its tax provisions. *Alco*, 417 U.S. at 375. In *Alco*, the Court sustained a tax of 20% of gross receipts on commercial parking operations. Both the Supreme Court of Pennsylvania, which struck down the tax in *Alco*, and this Court, in reversing, noted "that the city had decided, 'not without reason, that commercial parking operations should be singled out for special taxation to raise revenue because of traffic related problems engendered by these operations.'" *Id.* (quoting 307 A.2d at 858) (emphasis added by this Court). A different kind of traffic is involved in this case, but it is no less reasonable for Montana to see it as an appropriate source of tax revenue.

The Kurths were assessed \$181,000 in taxes on 1811 ounces of harvested marijuana in accordance with the statute.² It cannot seriously be disputed that the tax in this case seeks to

²Other parts of the original tax assessment were not appealed from the bankruptcy court, and only the tax on harvested marijuana is at issue in this appeal.

reach real economic value. "The extended Kurth family entered the marijuana growing business 'with but one purpose -- that of making large sums of money just as fast as possible in order to pay off a large debt against the family farm.'" *In re Kurth Ranch*, 986 F.2d at 1309. It is reasonable for Montana to enact a tax to direct a portion of those 'large sums of money' to the State Treasury.

II. Even if the Court determines that Montana's tax is a regulatory sanction, the Court of Appeals has misapplied *Halper* in this case.

A. The Court of Appeals erred by initially requiring proof of Montana's damages and costs.

Halper does not fit the facts of this case. "What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Halper*, 490 U.S. at 449. The Court

of Appeals cites the correct standard from *Halper*, but Montana has not imposed a fixed penalty, and there is nothing small-gauge about the Kurths' activities.

"If the additional civil sanction appears sufficiently disproportionate to the remedial goals claimed by Revenue, the Kurths are entitled to an accounting to determine if the sanction constitutes an impermissible additional punishment." *In re Kurth Ranch*, 986 F.2d at 1309. That is correct only if Montana's statute is truly a penalty and not a tax.

However, the Court of Appeals, without finding that the statute is or may be disproportionate, holds Montana responsible for making an accounting anyway. That is wrong. A defense to a tax assessment alleged to be a penalty should require some initial proof of disproportionality by the taxpayer. Where double jeopardy is asserted, the Defendant should at least be required to show in the first

place that the threat of a second punishment (rather than a remedial sanction) is real.

The facts of *Halper* illustrate that a sanction must be "overwhelmingly disproportionate" before it may constitute a second punishment. Halper filed 65 false Medicaid claims and cheated the government out of less than \$600.00. The penalty sought against him was over \$130,000.00. The fixed penalty of \$2,000.00 per offense plus double damages was punitive as applied to *Halper* but is still appropriate in the ordinary case. *Halper*, 490 U.S. at 449; *United States v. Hess*, 317 U.S. 537 (1943).

In *Hess*, Justice Frankfurter thought that "the respondents here, ought to be allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the government's loss." *Id.* at 554. (Frankfurter, J., concurring). This is essentially the position adopted by the Court in *Halper*.

If a civil sanction appears overwhelmingly disproportionate on its face or as applied in a particular case, then the government must show its damages and costs in order to avoid the conclusion that the sanction is punitive and, therefore, barred by double jeopardy. In the absence of some preliminary showing by the Defendants from the statute or the facts of the case that a sanction is overwhelmingly disproportionate, the Court of Appeals was wrong to require Montana to prove proportionality. Otherwise, *Halper* becomes, not the rare case, but the routine.

- B. The Court of Appeals erred in failing to find a proportionate, remedial effect.

If the Court determines that Montana's statute is only a penalty and that Montana must show in the first instance that the Kurths are not being punished in this case, Montana has met its burden. Even if Montana's tax were analyzed as a sanction, it has the proportionality which was

lacking in *Halper*.³ Proportionality is built into the statute.

The excise tax in this case is much like familiar taxes on cigarettes and alcohol. Common knowledge of the health problems associated with all of these substances is more than enough justification for a proportionate excise tax, if any justification is needed. It is reasonable to remedy the harm done by the Kurths to Montana by imposing a proportionate tax rationally related to the economic value of their business.

The amount or rate of Montana's tax is not punitive, especially considering that taxable economic value may often escape the tax. Collection of the tax in the absence of an arrest is

³The Court has also recently considered *Halper* in the context of forfeitures. *Austin v. United States*, 113 S.Ct. 2801 (1993). In *Austin*, the government sought to forfeit a business and mobile home following the sale of two grams of cocaine. The Court determined that the forfeiture statutes as a whole lacked proportionality because "the value of the ... property forfeitable ... can vary so dramatically that any relationship between the government's actual costs and the amount of the sanction is merely coincidental." *Id.* at 2812, n.14. The amount which the Kurths and other taxpayers are required to pay under the excise tax is not coincidental but is always directly related to the amount of substance which they possess.

unlikely because the usual tax enforcement requirements of permits, reports and record-keeping are problematic in view of concern about self-incrimination. *Marchetti*, 390 U.S. at 50-57. Certainly there is nothing to show that the Kurths had previously paid any tax on their activities, although the record shows that they cultivated marijuana as a large scale business for a year and a half before their arrest.

A tax of \$100.00 per ounce of marijuana was a legitimate exercise of the taxing power in *Sanchez* and should be at least as non-punitive now as it was more than forty years ago. *Sanchez* 340 U.S. at 45.⁴ It would be illogical to view a tax of 10% of market value as punitive when Montana can tax its coal at 30%. A 50% penalty on taxes attributable to illegally earned income does not violate double jeopardy. *Helvering v. Mitchell*, 303 U.S. 391 (1938). It would be odd to permit a penalty on taxes

⁴Inflation between 1950 and 1992, as measured by the Consumer Price Index for urban consumers, was approximately 484%. U.S. Dept. of Commerce, Bureau of Labor Statistics.

covering illegal activities and not permit recovery of the tax itself.

CONCLUSION

Montana's statute is a true tax and, as such, is not subject to a double jeopardy analysis appropriate only to disproportionate penalties. Even if Montana's statute is viewed as a sanction, it is proportionate and remedial on its face and as applied to the Kurths in this case. If the Court accepts the Court of Appeals' view of double jeopardy in this case, the difficulties of the states in administering their taxes and their sanctions may well be greatly multiplied.

The *amici* states respectfully ask the Court to reverse the Court of Appeals and hold that Montana's tax assessment is valid.

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